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## Reconstituting Japanese Law: International Norms and Domestic Litigation

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## ESSAY

# RECONSTITUTING JAPANESE LAW: INTERNATIONAL NORMS AND DOMESTIC LITIGATION

Timothy Webster\*

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Two hundred million people live abroad, roughly three percent of the world's population.<sup>1</sup> Most seek better economic opportunities; migration generally flows toward developed countries. While many foreigners are assimilated seamlessly into their new homes, others face a less hearty welcome. Global displacements have bred xenophobia, a complex

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\* Fellow, China Law Center, Yale Law School. I appreciate the comments of Professor Veronica Taylor and the other participants at the Japanese Studies Association of Australia Conference (Australian National University), the Julius Stone Centenary Conference (University of Sydney), and the Annual Meeting of the Law and Society Association (Humboldt University).

1. Adam Roberts, *Open Up: A Special Report on Migration*, *ECONOMIST*, Jan. 5, 2008, at 4.

phenomenon with various manifestations: violence, mockery, and exclusion are unfortunately all too common reactions to visibly alien visages.

Approximately two million foreigners currently reside in Japan, a fourfold increase from 1991. While Japanese xenophobia eschews the violence of its western counterparts, it is no less palpable. Its guises include housing discrimination, ejection from stores, employment discrimination, and exclusion from private establishments, public facilities, clubs, organizations, and financial services. These, at least, are the forms of xenophobia that have been the subject of litigation in Japan.

A landmark 1998 decision, rendered by the Shizuoka District Court, has emboldened many foreigners to file their own racial discrimination lawsuits.<sup>2</sup> Many have won damage awards from Japanese individuals, stores, and public facilities. Most plaintiffs are from the United States, although this trend is not an American imposition.<sup>3</sup> Brazilian, Chinese, German, Indian, and Korean plaintiffs have also filed racial discrimination lawsuits.<sup>4</sup> By examining successful and unsuccessful cases brought in Japanese courts, this Essay adumbrates the lines of “tolerable” racial practices in Japan. Under what circumstances, to employ the standards of the Japanese judicial system, is discrimination *reasonable*?

These cases form part of a larger debate unfolding in both Japan and the rest of the world. Namely, what is the role of law in proscribing discrimination? Should racial discrimination fall within the purview of national (or local) legislation? Or, is the judiciary primarily responsible? Since the United States passed the Civil Rights Act of 1964, numerous countries have followed suit.<sup>5</sup> The United Kingdom, European Union, Australia, and, most recently, Hong Kong have all passed laws to ban some forms of racial discrimination in the private sphere.<sup>6</sup>

The Japanese Diet has twice tried to pass similar legislation.<sup>7</sup> A third attempt is unlikely, leaving the issue for other political actors to solve. The Japanese judiciary has stepped in to define these limits, I argue, by melding international and domestic law. Where legislators have tried and

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2. Bortz v. Suzuki, 1045 HANREI TAIMUZU 216 (Shizuoka D. Ct., Oct. 12, 1999).

3. Many Japanese believe that the United States imposed the present Constitution on Japan. Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L J. CONST. L. 224, 224 (2003) (“[T]he Constitution of Japan . . . was not borrowed but rather imposed by the occupying forces [of the United States] after the Second World War.”); cf. Timothy Webster, Note, *Legal Excisions*, 39 CORNELL INT'L L.J. 435, 437 (2006).

4. See *infra* Part II.A.

5. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1981-200h-6 (2000)).

6. See, e.g., Race Discrimination Ordinance, (2008) Cap. 602 (H.K.) (implementation pending); Council Directive 2000/43/EC, 2000 O.J. (L 180) (EC); Racial Discrimination Act, 1975, c. 9 (Austl.); Race Relations Act, 1976, c. 74 (Eng.).

7. See *infra* Part IV.A.

failed, judges now determine, one case at a time, where the boundaries of permissible racial discrimination lie. This has led to some puzzling decisions, of course, but on the whole the courts repeatedly rule against discriminators.

This Essay proceeds in four parts. Part I situates these lawsuits in the context of Japan's growing ethnic diversity. Part II analyzes a decade of racial discrimination lawsuits in Japan, ultimately synthesizing the elements of a compensable act of racial discrimination under current Japanese law. Part III begins with a brief examination of the role of international law in Japan before turning to discussions between the Japanese government and U.N. bodies regarding the proper treatment of foreigners in Japan and the desirability of anti-discrimination laws. Part IV then discusses several failed attempts by national and local lawmakers to pass anti-discrimination legislation and ordinances. A brief conclusion follows.

## I. JAPAN AND THE WORLD

Japan is slowly coming to grips with the reality of ethnic otherness on its own turf. For centuries, Japan fancied itself a "closed nation" (*sakoku*). This introversion slowly eroded, however, in the late nineteenth century, as Japan opened to the West. Nearer to home, Japan used its military strength to colonize much of east and southeast Asia. At its territorial zenith, in the early 1940s, Japan occupied Taiwan, Korea, Manchuria, and parts of mainland and island southeast Asia. Colonial subjects became citizens of the Japanese empire, and—through cultural, social, and linguistic practices—were expected to assimilate into the collective Japanese identity. With the end of World War II, Japan once again returned to its insular ways, denaturalizing residents of the former colonies and rebuilding itself.

In the 1980s, Japan's economic success made it a particularly popular destination for immigrants. Since then, as increasing numbers of foreigners move to Japan, their presence challenges the mythic homogeneity of Japan. Some Japanese accommodate ethno-racial difference without incident. But others obdurately cling to the myth of ethnic singularity ("mono-myth"). The notion that Japan is culturally, ethnically, and geographically *distinct* from the rest of humanity is called *Nihonjinron*, or "theory of the Japanese people." This belief continues to hold sway in Japan, and helps to fuel the chauvinism at least partially responsible for many instances of xenophobia.<sup>8</sup> To be sure, chauvinism has many names

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8. See John Lie, *The Discourse of Japaneseness, in JAPAN & GLOBAL MIGRATION: FOREIGN WORKERS AND THE ADVENT OF A MULTICULTURAL SOCIETY* 70, 85 (Mike Douglass

and analogues throughout the world, and Japan is no different from other countries in this regard.

What distinguishes Japan, however, is the length to which Japanese and foreign critics have gone to propagate this myth. Particularly after World War II, "the self-image of Japan as an island nation that contained no aliens and was therefore peaceful and tranquil" took root.<sup>9</sup> As Japan's economy and self-confidence grew in the 1970s, the popular media and the academy took part in an "unprecedented boom in theories about the Japanese."<sup>10</sup> Emphasis on the uniqueness of the Japanese reinforced the idea that ethnic others, who did not fit into the domestic social agenda, could be ignored, or alienated.

*Nihonjinron* is not just a construct of the popular imagination, but has implications for law and policy as well. Take, for instance, the Immigration Control Act, which helped change the face of Japanese unskilled labor.<sup>11</sup> During the 1980s, migrants from Asia and South America went to Japan to perform unskilled labor. Rather than create a legal status for the migrants, however, the Japanese Diet introduced penalties against employers who hired illegal workers, as well as those who helped employers to find such labor.<sup>12</sup>

At the same time, the Act opened up two conduits for the importation of unskilled laborers.<sup>13</sup> First, an administrative order to implement the Act permitted the children and grandchildren of Japanese citizens—most of whom live in South America<sup>14</sup>—the right to receive long-term resident status in Japan.<sup>15</sup> This permitted hundreds of thousands of Japanese Latinos, primarily Brazilians, but also some Peruvians, the

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& Glenda S. Roberts eds., 2000) ("The central conclusion and the fundamental assumption of all *Nihonjinron* writings are that Japanese people and culture are different, even unique.").

9. EIJI OGUMA, A GENEALOGY OF "JAPANESE" SELF-IMAGES 299 (David Askew trans., 2002).

10. *Id.* at 319.

11. See Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō [Immigration Control and Refugee Recognition Act], Cabinet Order No. 319 of 1951; see also Sumi Shin, *Global Migration: The Impact of "Newcomers" on Japanese Immigration and Labor Systems*, 19 BERKELEY J. INT'L L. 265, 279 (2001).

12. Shin, *supra* note 11, at 279.

13. See Chikako Kashiwazaki & Tsuneo Akaha, *Japanese Immigration Policy: Responding to Conflicting Pressures*, MIGRATION INFO. SOURCE, Nov. 2006, <http://www.migrationinformation.org/Profiles/display.cfm?ID=487>.

14. See Japanese Ministry of Foreign Affairs [MOFA], *Recommendations of Overseas Emigration Council Future Policy Regarding Cooperation with Overseas Communities of Nikkei*, <http://www.mofa.go.jp/policy/emigration/nikkei.html> (last visited Nov. 14, 2008).

15. Teijūsha kokuji (Heisei Ninen Hōmushō kokuji dai 132 gō) no Ichibu Kaisei ni tsuite [A Partial Amendment to the Long-Term Resident Notification (Ministry of Justice Notification 132 of 1990)], Ministry of Justice Notification 496 of 2005, art. 2(3), available at <http://www.moj.go.jp/NYUKAN/HOUREI/h06.html> (extending this privilege to the children and grandchildren of Japanese citizens).

opportunity to work for three-year stints in Japan. The Brazilian population in Japan consequently more than quintupled between 1990 and 2004.<sup>16</sup>

This policy further entrenched the mono-myth by limiting the number of ethnic others. Descendants of Japanese emigrants *look* Japanese for all intents and purposes. And, since they rarely had the chance to mingle with Japanese society, their different social, cultural, and linguistic habits did not often surface.

Second, a smaller number of “traineeships” opened up to foreigners in fields such as agriculture, construction, machinery, and manufacturing, jobs considered undesirable by most Japanese.<sup>17</sup> Other foreigners have entered Japan under student visas or the more ambiguous “entertainer” visas, which encompass athletes, “dancers,” musicians, and prostitutes.<sup>18</sup> But, since many “trainees” and “entertainers” tend to live on the margins of Japanese society, they do not often meaningfully interact with Japanese people.

Still, the number of foreigners increases. According to the Ministry of Justice’s 2006 figures,<sup>19</sup> the largest group of foreign nationals in Japan continues to be resident Koreans, at 598,000.<sup>20</sup> Close behind are the Chinese, whose numbers in Japan more than doubled in a decade to 560,000.<sup>21</sup> Given Japan’s large diaspora population in the southern hemisphere,<sup>22</sup> it is no surprise that the Brazilian population is the third largest,

16. See Kashiwazaki & Akaha, *supra* note 13.

17. Shutsunyūkoku Kanri Oyobi Nanmin Nintei Hō [Immigration Control and Refugee Recognition Act], Cabinet Order No. 319 of 1951, app. tbl. 4; Kashiwazaki & Akaha, *supra* note 13.

18. See Kashiwazaki & Akaha, *supra* note 13.

19. Press Release, Immigration Bureau, Ministry of Justice, Heisei jūhachi nenmatsu genzai ni okeru gaikokujin tōrokusha tōkei ni tsuite [Statistics on foreign nationals registered at the end of 2006] (2007), available at <http://www.moj.go.jp/PRESS/070516-1.pdf> [hereinafter 2006 Statistics] (listing the number of foreigners living in Japan from 1997 to 2006); Press Release, Immigration Bureau, Ministry of Justice, Heisei jūroku nenmatsu genzai ni okeru gaikokujin tōrokusha tōkei ni tsuite (gaiyō) [Statistics on foreign nationals registered at the end of 2004 (OUTLINE)] (2005), available at <http://www.moj.go.jp/PRESS/050617-1/050617-1.html> [hereinafter 2004 Statistics] (listing the number of foreigners living in Japan from 1996 to 2004).

20. Although legally foreign, most resident Koreans are second- or third-generation descendants of Koreans who were brought to Japan during the colonial period (1910–1945). Most have lived in Japan for their entire lives, speak Japanese, and have little connection with Korea. According to the 2006 statistics, they number roughly 600,000. 2006 Statistics, *supra* note 19, at 3. In countries with less restrictive citizenship requirements, such as the United States, most would be eligible for citizenship simply by being born in the country. See Immigration and Nationality Act § 301(a), 8. U.S.C. § 1401(a) (2000).

21. 2006 Statistics, *supra* note 19, at 3.

22. See MOFA, *supra* note 14.

at 312,000.<sup>23</sup> Next are Filipinos (193,000), and then Peruvians (58,000).<sup>24</sup> U.S. nationals rank sixth in total number of foreigners, at 51,000.<sup>25</sup>

The U.S. ranks first, however, in the number of racial discrimination plaintiffs.<sup>26</sup> Perhaps due to an American predilection for litigation to resolve disputes, U.S. plaintiffs sue more frequently than other national groups. While their cases are not always successful—just as those in the United States—the concomitant jurisprudence has shed light on what level of discrimination is permissible in contemporary Japan. At the same time, it is important to realize that it is not just a case of ugly—or litigious—Americans here. People from all over the globe experience racism in Japan. This small subset has chosen the judiciary to hear their case.

## II. RACIAL DISCRIMINATION IN JAPAN

### A. Thesis: Impermissible Discrimination

Japanese expressions of racism are far more measured than their counterparts in the United States, Europe, and Australia. They take any number of forms, including “No Foreigners” signs (often in several languages to address the widest audience possible) and yelling racist epithets. Subtler manifestations involve *unwritten* policies, such as regulating the number of foreign members in a given club. The more visible the discrimination, the more likely a court will find the act illegal. But this is not the sole factor. The success of a racial discrimination lawsuit hinges almost exclusively on its *provability*, that is, the strength of the evidence that the plaintiff musters in court.<sup>27</sup>

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23. 2006 Statistics, *supra* note 19, at 6.

24. *Id.*

25. *Id.*

26. There is no official source ranking the numbers of plaintiffs. My research reveals five American plaintiffs: Arudou Debito (who subsequently became a naturalized citizen of Japan), Kenneth Sutherland, Douglas Shukert, Steven Herman, and Steve McGowan. I have discovered four Korean plaintiffs. See *infra* Part II.B (describing three plaintiffs in the golf club cases); see also *infra* note 40 (describing the plaintiff in the *Hitachi* case). Furthermore, I have come across two Indian plaintiffs, one Chinese plaintiff, and one Brazilian plaintiff.

27. See, e.g., *McGowan v. Narita*, Wa No. 11926 (Osaka D. Ct., Jan. 30, 2006); Timothy Webster, *Case Note and Commentary: McGowan v. Narita*, 9 AUSTL. J. ASIAN L. 346 (2008) [hereinafter Webster, *McGowan v. Narita*]. In this case, an African-American male was shooed away by a Japanese store employee who told him, *inter alia*, “I hate black people.” *McGowan*, Wa No. 11926, at 4; Webster, *McGowan v. Narita*, *supra*, at 346. The trial court did not believe that the plaintiff understood Japanese well enough to understand such statements and dismissed his claim. *McGowan*, Wa No. 11926, at 7, 16; Webster, *McGowan v. Narita*, *supra*, at 358. The appellate court overturned this decision, awarding the plaintiff 350,000 yen. See, e.g., Eric Johnston, *Plaintiff Gets Redress, But Not for Racial Bias*, JAPAN TIMES, Oct. 19, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20061019a4.html>.



Just as the acts vary, so too do the targets. Men and women have filed suit. Plaintiffs of many ethnicities—European, European-American, African-American, Latino, Indian, Chinese, and resident Korean—have all sued for racial discrimination. As the following analysis shows, even naturalized Japanese citizens—white and Asian—encounter discrimination.

This Section first focuses on lawsuits in which foreigners<sup>28</sup> have won monetary damages for acts of discrimination. In such instances, Japanese courts have determined that the discriminatory conduct at issue is illegal. Plaintiffs include (1) a Brazilian woman,<sup>29</sup> (2) three European-American men (one of whom became a naturalized citizen of Japan),<sup>30</sup> (3) an Indian man,<sup>31</sup> (4) an African-American man,<sup>32</sup> and (5) a naturalized Japanese citizen of Chinese descent.<sup>33</sup>

The following Section will examine lawsuits in which foreign plaintiffs have *not* won monetary compensation. The discrimination that they encountered—in a bank,<sup>34</sup> a golf club,<sup>35</sup> and an amateur sports league<sup>36</sup>—was declared legal. In these cases, courts determined that the defendants had a “rational” basis. The policy or action could very well be *discriminatory*, but the circumstances did not make it irrationally so. The selection of these suits is dictated in large part by access. A review of the publicly available case law permits reflection on a sufficiently broad swath of behavior to differentiate between legal (or “rational”) and illegal discrimination.

Throughout the cases, the International Convention on the Elimination of Racial Discrimination (CERD) serves as a normative anchor.<sup>37</sup> Without a domestic law that covers private acts of racial discrimination, Japanese courts indirectly apply international treaty law to fill the gap.<sup>38</sup>

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28. Two of these plaintiffs were actually naturalized citizens. Their newly acquired citizenship did not, however, shield them from discrimination.

29. *Bortz v. Suzuki*, 1045 HANREI TAIMUZU 216 (Shizuoka D. Ct., Oct. 12, 1999).

30. *Arudou v. Earth Cure*, 1150 HANREI TAIMUZU 185 (Sapporo D. Ct., Nov. 11, 2002).

31. *Murthy v. Nikken Jūhan*, Wa No. 2332, at 2 (Saitama D. Ct., Jan. 14, 2003).

32. *Johnston*, *supra* note 27, at 1.

33. Wa No. 14386 (Tokyo D. Ct., Sept. 16, 2004). Parties' names are unknown in this case.

34. *Herman v. Asahi Bank*, 1789 HANREI JIHŌ 96 (Tokyo D. Ct., Nov. 12, 2001).

35. *Hyon v. Chiba Country Club*, 1773 HANREI JIHŌ 36 (Tokyo D. Ct., May 31, 2001), *aff'd* 1773 HANREI JIHŌ 34 (Tokyo H. Ct., Jan. 31, 2002); *Plaintiff v. Hachiōji Country Club*, 1043 HANREI JIHŌ 74 (Tokyo D. Ct., Sept. 9, 1981).

36. Kenji Hall, *Supreme Court Denies American's Demand to Open Japan's National Sports Tourney to Foreigners*, ASSOCIATED PRESS, June 11, 2004 (on file with author).

37. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force for Japan on Jan. 14, 1996) [hereinafter CERD].

38. See *infra* notes 51-53 and accompanying text.

International law provides the interpretive compass by which courts draw the boundaries of unacceptable conduct.

### 1. *Bortz v. Suzuki*<sup>39</sup>

Although not the first foreigner to sue for discrimination,<sup>40</sup> Ana Bortz nevertheless put racial discrimination on the map of Japanese jurisprudence.<sup>41</sup> In 1998, the Brazilian reporter was ordered to leave a jewelry store in Hamamatsu, a city of more than half a million people. After the owner discovered that she was Brazilian, and not French as he had assumed, he pointed to a sign in the store that said “foreigners are strictly forbidden.”<sup>42</sup> Bortz remonstrated with the owner, store employees, and local police that this behavior violated her human rights.<sup>43</sup> She also summoned her colleagues from the foreign media, in the hopes that external pressure would force the storeowners to capitulate.<sup>44</sup> When the storeowners refused to apologize, Bortz sued.<sup>45</sup> As no law specifically prevented this kind of behavior, however, her decision to sue was fairly remarkable.

Bortz won a hefty 1.5 million yen (\$12,500) damages award.<sup>46</sup> In a discursive opinion, the Shizuoka District Court held that the storeowner’s conduct constituted a tort (“illegal act”) under Japanese law.<sup>47</sup> The Japanese tort system requires compensation for infringement of a person’s rights.<sup>48</sup> Since ejecting Bortz injured her basic human right to

39. *Bortz v. Suzuki*, 1045 HANREI TAIMUZU 216 (Shizuoka D. Ct., Oct. 12, 1999).

40. In 1970, Hitachi suspended an employment offer to a resident Korean who had initially lied about his family background. The court specifically found that Hitachi acted with “no apparent reason other than the factor of ethnic discrimination [*minzokuteki sabetsu*]” in rescinding the contract. IAN NEARY, HUMAN RIGHTS IN JAPAN, SOUTH KOREA AND TAIWAN 46–47 (2002). This, however, was ethnic discrimination and not racial discrimination *per se*. See *id.* at 46–47. More recently, but before Japan ratified CERD, Indian plaintiff Kamal Sinha sued Mitsubishi for racial discrimination. See C.T. Mahabharat, *Indian Engineer Sues Mitsubishi*, NEWSBYTES PM, Mar. 26, 1993 (on file with author). He charged Mitsubishi with job discrimination and sued for \$40,000 in damages. *Id.* It is not known how the case resolved.

41. See *Bortz*, 1045 HANREI TAIMUZU at 216; Timothy Webster, *Bortz v. Suzuki: A Translation and Introduction*, 16 PAC. RIM L. & POL’Y J. 631 (2007) [hereinafter Webster, *Bortz v. Suzuki*]. References to the *Bortz* case will cite to the official reporter and to the translation contained in the *Pacific Rim Law & Policy Journal* article.

42. *Bortz*, 1045 HANREI TAIMUZU at 217; Webster, *Bortz v. Suzuki*, *supra* note 41, at 633.

43. *Bortz*, 1045 HANREI TAIMUZU at 217; Webster, *Bortz v. Suzuki*, *supra* note 41, at 634.

44. *Bortz*, 1045 HANREI TAIMUZU at 217; Webster, *Bortz v. Suzuki*, *supra* note 41, at 633–34.

45. *Bortz*, 1045 HANREI TAIMUZU at 218; Webster, *Bortz v. Suzuki*, *supra* note 41, at 634.

46. *Bortz*, 1045 HANREI TAIMUZU at 231; Webster, *Bortz v. Suzuki*, *supra* note 41, at 652.

47. *Bortz*, 1045 HANREI TAIMUZU at 231; Webster, *Bortz v. Suzuki*, *supra* note 41, at 652.

48. See MINPŌ, art. 709 (“A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.”); *id.* art. 710 (“A person liable for damages under the provisions of the preceding Article must also compensate for damages other than those to property, regardless of whether the body, liberty, reputation or

"dignity and honor,"<sup>49</sup> the court determined that the jeweler was liable to Bortz for the mental anguish that he had caused.<sup>50</sup>

In arriving at this conclusion, the court pointed out that CERD could fill the legislative gap left by the Japanese government: "[I]f an act of racial discrimination violated a provision of CERD, and the [S]tate or organization did not take the measures that it should have, then one could, in accordance with Article 6 of CERD, at the very least seek compensation for damages . . . due to the omission."<sup>51</sup> Furthermore, if the government would not implement legislation banning discrimination, the "text of CERD should be used as the interpretative standard" in determining what kind of behavior is illegal.<sup>52</sup> In this way, Judge Soh Tetsuro bypassed Japanese law and reached out to international law.

The judgment led to the first tort of racial discrimination in Japanese law<sup>53</sup> and the largest damages award for racial discrimination to this day.<sup>54</sup> Important for present purposes, the decision also inspired other foreigners to avail themselves of Japanese courts to vindicate human rights abuses. The *Bortz* decision offers an important, although not binding, precedent for similarly aggrieved foreigners.<sup>55</sup>

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property rights of others have been infringed"). The court found violations of both provisions and ordered compensation accordingly. See *Bortz*, 1045 HANREI TAIMUZU at 231; Webster, *Bortz v. Suzuki*, *supra* note 41, at 666.

49. *Bortz*, 1045 HANREI TAIMUZU at 231; Webster, *Bortz v. Suzuki*, *supra* note 41, at 666.

50. *Bortz*, 1045 HANREI TAIMUZU at 231; Webster, *Bortz v. Suzuki*, *supra* note 41, at 666.

51. *Bortz*, 1045 HANREI TAIMUZU at 225; Webster, *Bortz v. Suzuki*, *supra* note 41, at 652.

52. *Bortz*, 1045 HANREI TAIMUZU at 225; Webster, *Bortz v. Suzuki*, *supra* note 41, at 652.

53. *Bortz*, 1045 HANREI TAIMUZU at 220; Webster, *Bortz v. Suzuki*, *supra* note 41, at 640–41 ("In the courts, there have been no verdicts holding purely private acts of racial discrimination illegal.").

54. By contrast, subsequent plaintiffs in racial discrimination suits received far less. Arudou Debito received 1 million yen in damages, while Steve McGowan received less than one third of Bortz's award (and only after appealing). See *infra* notes 55, 110 and accompanying text.

55. Various foreign plaintiffs have noted that the *Bortz* verdict catalyzed their own decision to sue. See, e.g., ARUDOU DEBITO, JAPANIZU ONRII: OTARU ONSSEN NYŪYOKU KYOHJI MONDAI TO JINSHU SABETSU [JAPANESE ONLY: THE ISSUE OF REFUSING ENTRANCE TO OTARU HOT SPRINGS AND RACIAL DISCRIMINATION] 47 (2003); *Cultural Discrimination: Foreigners Banned from the National Sports Festival*, An Interview with Douglas Shukert, Z MAGAZINE ONLINE (on file with author) (describing how a U.S. hockey player sued an amateur sports association that prevented his participation in a national hockey festival after reading "an article on the Ana Bortz case"); Peter Hadfield, *Japan's Foreigners Fight Back Against Widespread Bias: They Say They're Denied Access to Loans, Baths, Bars*, USA TODAY, Mar. 8, 2000, at A24 (noting that Steve Herman was "inspired" to sue Asahi Bank after hearing about the *Bortz* verdict).

## 2. *Arudou v. Yunohana Bathhouse*<sup>56</sup>

Given her connections to the foreign media, the *Bortz* decision made ripples in Japan and abroad, including on the front page of *The New York Times*.<sup>57</sup> In Japan, one of many foreigners who heard about the case was self-styled human rights activist Arudou Debito (*né* David Aldwinckle). Arudou has engaged in his own quixotic campaign against racial discrimination in Japan for over a decade. In the late 1990s, he tilted against several bathhouses in northern Japan that had posted “No Foreigners” or “Japanese Only” signs on their doors.<sup>58</sup> The attention generated by his attempted “walk-ins” led at least two bathhouses to remove their signs and renounce their exclusionary policies.<sup>59</sup> One bathhouse that did not, however, found itself in a legal imbroglio that Arudou pursued all the way to the Supreme Court of Japan.<sup>60</sup>

Arudou twice attempted to enter the Yunohana bathhouse, located in the coastal town of Otaru. On September 19, 1999, he convened a multinational group of seventeen people of various nationalities (United States, Chinese, German, and Japanese) to enter the bathhouse.<sup>61</sup> Although he and another white man were denied entrance, a Chinese woman was permitted to enter.<sup>62</sup> Moreover, the manager permitted the more “Asian-looking” of his two biracial daughters into the premises, but not the more “Caucasian-looking” one.<sup>63</sup> The bathhouse operators did not strictly construe their “Japanese Only” sign.

56. *Arudou v. Earth Cure*, 1150 HANREI TAIMUZU 185 (Sapporo D. Ct., Nov. 11, 2002).

57. See Howard W. French, “*Japanese Only*” Policy Takes Body Blow in Court, N.Y. TIMES, Nov. 15, 1999, at A1.

58. The bathhouses first posted these signs in response to customers’ complaints about unruly—and frequently inebriated—Russian sailors, whose antics in the baths upset other clientele. *Arudou*, 1150 HANREI TAIMUZU at 187. The categorical ban on foreigners proved effective, in the short term, to eliminate such behavior, but the Sapporo District Court determined that the ban was too broad in its application. *Arudou*, 1150 HANREI TAIMUZU at 194; see also *infra* note 71 and accompanying text.

59. Arudou Debito, “*Gaikokujin*” *nyūten kinshi to iu jinshu sabetsu* [Racial discrimination based on denying “foreigners” entrance into stores], in NIHON NO MINZOKU SABETSU: JINSHU SABETSU TEPPAI JŌYAKU KARA MITA KADAI [JAPAN’S ETHNIC DISCRIMINATION: ISSUES DERIVING FROM CERD] 218, 219 (Okamoto Masataka ed., 2005) (noting that the Otaru Spa and Panorama Bathhouse took down their signs in 2000 and 1999, respectively).

60. See *Arudou*, 1150 HANREI TAIMUZU at 185; Timothy Webster, *Arudou v. Earth Cure Judgment of November 11, 2002 Sapporo District Court Translation*, 9 ASIAN-PAC. L. & POL’Y J. 297 (2008) [hereinafter Webster, *Arudou v. Earth Cure*]; *Top Court Dismisses Appeal in Bathhouse’s Rejection of Foreigners*, KYODO NEWS INT’L, Apr. 7, 2005 (on file with author) (describing Supreme Court’s rejection of plaintiff’s appeal). As with the *Bortz* decision, references to this case will cite to both the English translation and to the Japanese original.

61. ARUDOU, *supra* note 55, at 23–24.

62. *Id.* at 28.

63. *Id.*

In 2000, Arudou took Japanese citizenship and once again tried to enter the bathhouse on October 31, 2000.<sup>64</sup> He was once again refused. Although he tendered proof of his Japanese citizenship, the store manager told him that his foreign *appearance* had not changed; other customers would not understand that he was a citizen of Japan, so he must be denied entrance. Together with two other white men who had also been refused entrance at Yunohana, Arudou filed a lawsuit. He sued the bathhouse for its openly discriminatory policy, and the Otaru municipal government for not passing an ordinance to ban racial discrimination.<sup>65</sup>

The Sapporo District Court was responsive to the first claim, but not to the second.<sup>66</sup> As for the bathhouse's policy and repeated refusals of foreigners, the court held that, in "light of the meaning of Article 14(1) of the [Japanese] Constitution,"<sup>67</sup> Article 26 of the [International Covenant on Civil and Political Rights (ICCPR)<sup>68</sup>], and CERD, these [acts] amount to private acts of racial discrimination that ought to be eliminated."<sup>69</sup> The court specifically determined that "categorically denying all foreigners constitutes irrational discrimination, exceeds social norms, and amounts to an illegal act."<sup>70</sup> Although Yunohana enjoys a right to practice a profession, and may eject patrons who are causing trouble in individual cases, a categorical ban was too broad to be considered rational.<sup>71</sup> As in

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64. See *Arudou*, 1150 HANREI TAIMUZU at 191; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 302.

65. *Arudou*, 1150 HANREI TAIMUZU at 187–88; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 300.

66. The claims against the municipal government were dismissed. The court held that Article 2(d) of CERD, which calls for "legislation as required by circumstance," imposes merely a "political obligation," and not a "legal obligation," on municipal bodies. See *Arudou*, 1150 HANREI TAIMUZU at 194; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 319.

67. KENPŌ, art. 14, para. 1 ("All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.").

68. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states,

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights art. 26, Dec. 19, 1966, S. EXEC. DOC. E, 95–2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).

69. *Arudou*, 1150 HANREI TAIMUZU at 193–94; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 317–18.

70. *Arudou*, 1150 HANREI TAIMUZU at 194; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 318.

71. *Arudou*, 1150 HANREI TAIMUZU at 194; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 318.

*Bortz*, the court ordered compensation based on the mental anguish that the plaintiffs had suffered.<sup>72</sup>

As to the second claim, against the municipal government, the court held that there was no “clear and uniform obligation” to pass an anti-discrimination law.<sup>73</sup> Article 2(1) of CERD provides that “[e]ach State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstance, racial discrimination by any person, group or organization.”<sup>74</sup> The court construed this language to impose a “political obligation,” not a “legal obligation,” on Otaru.<sup>75</sup> Since Otaru hosted several meetings, distributed fliers, and repeatedly requested Yunohana to end their policy, the court determined that it had fulfilled this obligation.<sup>76</sup>

### 3. *Murthy v. Nikken Jūhan*<sup>77</sup>

Srirama Chandra Bemri Murthy, a citizen of India, had spent many years in Japan, first with his diplomat father from 1990 to 1993.<sup>78</sup> He returned in late 1997, with a scholarship from the Japanese Ministry of Education, to study at Keio University. He remained in Japan, working at a software company. In 2001, he sought housing for himself and his pregnant wife. After being rejected from various real estate agencies, he decided to call instead.

He explained his situation in Japanese to a real estate agent at Nikken Jūhan in the following way.<sup>79</sup> He first explained that he was an Indian citizen looking for a place to live. The real estate agent then asked him what the color of his skin was. Murthy hesitated, whereupon the agent repeated her question. “The color of my skin?,” Murthy clarified.

72. *Arudou*, 1150 HANREI TAIMUZU at 195; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 321.

73. *Arudou*, 1150 HANREI TAIMUZU at 195; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 320.

74. CERD, *supra* note 37, art. 2.

75. *Arudou*, 1150 HANREI TAIMUZU at 195; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 320.

76. *Arudou*, 1150 HANREI TAIMUZU at 195; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 320.

77. *Murthy v. Nikken Jūhan*, Wa No. 2332, at 2 (Saitama D. Ct., Jan. 14, 2003). This case received a small amount of media attention in both the Japanese and Indian press. *See, e.g.*, Tony Laszlo, *Opinion: Wanted, Color-Blind Realtors*, JAPAN TIMES ONLINE, Aug. 8, 2003, [http://www.japantimes.co.jp/shukan-st/english\\_news/opinion/2003/op20030808/op20030808text.htm](http://www.japantimes.co.jp/shukan-st/english_news/opinion/2003/op20030808/op20030808text.htm) (providing more background); *Nation at a Glance: Japan Damages for Skin Colour Query*, TELEGRAPH-CALCUTTA, Jan. 16, 2003, available at [http://www.telegraphindia.com/1030116/asp/nation/story\\_1578380.asp](http://www.telegraphindia.com/1030116/asp/nation/story_1578380.asp) (providing details of the parties' names and backgrounds). Nikken Jūhan is an affiliate of the U.S. real estate giant, Century 21. *See* Nikken Corporation, <http://www.refo21.jp/com/> (last visited Sept. 24, 2008).

78. *Murthy*, Wa No. 2332, at 2.

79. *Id.*

"Is it a normal color?" the agent replied. Murthy again paused for clarification, "What does normal color of skin mean?" The agent further elaborated, "The color of Japanese skin."<sup>80</sup>

Murthy immediately hung up the phone. He wrote a letter to the real estate agency protesting the incident and demanding a written apology. He also wrote to the governor of Saitama Prefecture, asking the Prefecture to opine on the matter.<sup>81</sup> The real estate agency first sent an apology, bearing the signatures of both a company representative and the offending agent. Murthy was unconvinced by their sincerity. Next, the agent sent an apology that she had written herself. The representative and the agent finally agreed to meet with Murthy face-to-face, and even to provide financial compensation. Murthy remained dissatisfied by these offers.<sup>82</sup>

The Prefecture, even before the incident, had distributed to real estate agencies a pamphlet entitled "Manual on Leasing Real Estate for Landlords and Foreigners."<sup>83</sup> After receiving Murthy's letter, the Prefecture instructed real estate companies to train their agents on the basic human rights of foreigners.<sup>84</sup> Unimpressed by these various responses, Murthy filed a two-track lawsuit, *à la* Arudou, against the Prefecture, as well as against the real estate company and the agent.<sup>85</sup>

The Saitama District Court found that the agent's racially insensitive questions constituted a "serious illegal act that injured the Plaintiff's human dignity," rendering the agent liable under Article 709 of the Civil Code.<sup>86</sup> The court further held that the real estate agency was liable to Murthy under Article 715 of the Civil Code, which provides for respondeat superior liability.<sup>87</sup> That article provides that an employer shall be liable for an employee's illegal conduct if carried out in the normal course of business.<sup>88</sup> The court held that "it was clear that the plaintiff suffered emotional distress as a result of the illegal acts"<sup>89</sup> and ordered the agency to pay Murthy 400,000 yen in damages and 100,000 yen in attorney's fees.<sup>90</sup>

As in the *Arudou* decision, however, the court was more lenient with the Prefecture. In addition to distributing the manual, the Prefecture had

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80. *Id.* at 6.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 7.

86. *Id.*; see also MINPō, art. 709.

87. *Id.*; see also MINPō, art. 715.

88. MINPō, art. 715.

89. *Murthy*, Wa No. 2332, at 7.

90. *Id.*

also informed real estate agents about the *Murthy* case, and demanded that the agents act with honest respect for basic human rights. The plaintiff claimed that the Prefecture should have taken a stronger stance *before* the incident happened—in essence, warning real estate agencies that such conduct was not allowed. The court, however, did not find the Prefecture’s “failure to exercise its authority extremely unreasonable.”<sup>91</sup> Thus, it did not find that the Prefecture’s omission was illegal.

#### 4. *Plaintiff v. Tokyo Bar*<sup>92</sup>

The fourth lawsuit involves another Asian plaintiff, a naturalized Japanese citizen of Chinese descent.<sup>93</sup> The plaintiff first visited a bar in Tokyo’s Toshima Ward in February 2003, but was ejected after approximately one hour.<sup>94</sup> According to two of the defendants—a male employee and a female employee—the man’s loud bragging about his mafia-related activities offended various patrons (“I do it all. Guns, cocaine, smuggling—I do it all.”).<sup>95</sup> Their manager, after hearing about the incident, advised the male employee to deny the Chinese plaintiff entrance in the future.

After the incident, the plaintiff sought advice from a lawyer. The lawyer, no doubt aware of the difficulty of proving racial discrimination, counseled him to return to the bar and record his conversations with the staff.<sup>96</sup> The plaintiff revisited the bar at the end of May 2003, with a recording device placed inside his bag.<sup>97</sup> This time, the male employee simply refused to allow him in the bar. The following exchange between the plaintiff (P) and the male employee (D) clearly evinces discrimination:

D: Yes. I’m sorry but I have to ask, are you a foreigner?

P: Well, I was born in China.

D: Well, Chinese aren’t allowed at our bar.

P: Why aren’t they allowed?

D: For the time being, they aren’t allowed in.

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91. *Id.* at 8.

92. Wa No. 14386 (Tokyo D. Ct., Sept. 16, 2004).

93. *Id.* This case did not attract nearly as much media attention as those discussed above. I found only a passing reference in a *Japan Times* article about the *Arudou* case, and a short description of the case on appeal in the Japanese-language *Mainichi Shimbun*. But, it does appear in the LEX/DB Internet Database. Like all Japanese publication services (print or online), LEX/DB does not publish the names of the parties, choosing letters or numbers to signify plaintiff and defendant.

94. *Id.* at 2.

95. *Id.* at 3.

96. *Id.* at 4.

97. *Id.*



P: No, but I'm really going to pay.

D: No, no, even if you pay.

P: Foreigners aren't allowed?

D: Yes.

P: Well, I was born in China, but now I'm a naturalized Japanese.

D: Even so.

P: Even so, I'm not allowed?

D: Yes.

P: Well this bar . . .

D: Sir, haven't you been to our bar once or twice before?

P: No, I haven't.

D: I see. Well, in any event, we don't allow foreigners.<sup>98</sup>

This evidence convinced the Tokyo District Court that the plaintiff had experienced racial discrimination: "After entering the bar, Plaintiff was ejected in front of other customers for no reason other than being Chinese or Chinese-born. Later, he was refused entrance for the same reason. These incidents were very humiliating, and caused emotional distress."<sup>99</sup> Although the defendants objected that the first incident was motivated by the plaintiff's own unruly behavior,<sup>100</sup> the court noted that, during the second incident, the employee's statement suggested that the bar had a "basic policy" (*kihontekina hōshin*) of refusing foreigners;<sup>101</sup> this lent credibility to the plaintiff's testimony that the first incident was also racially motivated.

The court did not address whether the defendants' conduct specifically violated the provisions of law that the plaintiff had cited, such as Article 14(1) of the Japanese Constitution;<sup>102</sup> Article 26 of the ICCPR;<sup>103</sup> and Articles 2(1)(d), 5(f), and 5 of CERD.<sup>104</sup> The court did, however, note

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98. *Id.* at 6.

99. *Id.* at 5.

100. *Id.*

101. *Id.*

102. KENPō, art. 14, para. 1.

103. ICCPR, *supra* note 68, art. 26.

104. CERD, *supra* note 37, art. 2(1)(d) ("Each State Party shall prohibit . . . racial discrimination by any persons."); *id.* art. 5 (illustrating rights that all persons shall enjoy without discrimination); *id.* art 5(f) ("The right of access to any place or service intended for use by the general public . . .").

that refusing the plaintiff based on his nationality amounted to “discriminatory treatment not based on a legitimate reason, which should be illegal.”<sup>105</sup> It then ordered both the male employee and the manager to pay 550,000 yen in damages, and the female employee to pay 450,000 yen (she was not present for the May refusal). The court did not grant the full two million yen in damages that the plaintiff had initially sought because the bar “did not provide an indispensable service necessary to Plaintiff’s everyday existence.”<sup>106</sup>

On appeal, the Tokyo High Court acknowledged the illegality of the defendants’ conduct, but reduced the damages award to 300,000 yen.<sup>107</sup> This verdict was upheld by the Japanese Supreme Court in August 2005.<sup>108</sup>

### 5. *McGowan v. Narita*<sup>109</sup>

The *McGowan* decision represents a brief aberration in the unfolding of racial discrimination jurisprudence of Japan; McGowan had to appeal the trial court decision against him in order to vindicate his encounter with racism. Its divergence from the above trends makes it an extremely important case to consider, both for its jurisprudential value, such as it is, and as a warning to future plaintiffs.

Steve McGowan, an African-American designer, had lived in Japan for nearly a decade. He came to Japan with the U.S. Army Special Forces in 1995, married a Japanese woman, and settled outside of Osaka.<sup>110</sup> In September 2004, he stood outside of an eyeglass store, admiring some frames with a South African friend. “They have even better ones inside,” McGowan offered, as he had once visited the store.<sup>111</sup>

Narita Takashi, the director of the store, stepped out of the store. According to McGowan’s testimony, Narita unleashed a string of invective: “Get out of here. I hate black people. Don’t touch the door. Don’t touch the window. You’re bothering me. Impossible!”<sup>112</sup> Narita also waved the

105. Wa No. 14386 (Tokyo D. Ct., Sept. 16, 2004).

106. *Id.*

107. See *Gaikokujin nyūten kyōhi no sonbai soshō: misegawa no haiso kakutei—Saikōsai kettei* [Compensation claim against store that refused entrance to foreigner: Supreme Court affirms decision that store loses], MAINICHI SHIMBUN CHIIKI BAN, Aug. 4, 2005 (on file with author).

108. *Id.*

109. McGowan v. Narita, Wa No. 11926 (Osaka D. Ct., Jan. 30, 2006).

110. McGowan, Wa No. 11926, at 5; see also Webster, *McGowan v. Narita*, *supra* note 27, at 354. As with the *Bortz* and *Arudou* cases, this Essay will cite to the English-language translation of the *McGowan* opinion in addition to the original.

111. McGowan, Wa No. 11926, at 2; Webster, *McGowan v. Narita*, *supra* note 27, at 346.

112. McGowan, Wa No. 11926, at 7; Webster, *McGowan v. Narita*, *supra* note 27, at 355.

backs of both hands, “as if driving away an animal.”<sup>113</sup> McGowan was stunned.

More surprising than the incident itself was the Osaka District Court’s decision, handed down in January 2006. Due to “insufficient evidence,” the court dismissed McGowan’s claims; McGowan could not prove that he heard the above invective. The court dwelled on the fact that McGowan could not be sure whether he heard Narita claim that he hated “black people” (*kokujin*), or “foreigners” (*gaikokujin*).<sup>114</sup> This is a bizarre distinction for the court to draw, as either statement would register racism in this context: a Japanese man yelling at an African-American man that he hates foreigners/blacks.

More troubling still, when McGowan and his wife returned to the store to discuss the incident, Narita told them that he had “bad memories” of black people based on his prior experiences.<sup>115</sup> Thus, Narita became “excited” when he saw McGowan.<sup>116</sup> Nevertheless, the court held that McGowan was, in effect, not good enough at Japanese to ascertain the meaning of Narita’s utterances.<sup>117</sup>

Fortunately for McGowan, and the reputation of the Japanese judiciary, this decision was overturned on appeal. In an unpublished opinion rendered in October 2006, the Osaka High Court awarded McGowan 350,000 yen in compensation,<sup>118</sup> a fraction of what Arudou and Bortz had received. Like the district court, the appellate court did not find that Narita had committed an act of racial discrimination.<sup>119</sup> However, the appellate court did find that Narita’s acts exceeded “social norms,” which suffices to attach liability under Japanese tort law.<sup>120</sup>

To be sure, this reversal went a long way to restore the good name of the Japanese judiciary. However, it also points to a fundamental problem in racial discrimination lawsuits: the evidentiary burden. Since plaintiffs in Japanese civil suits face a very high burden of proof, at least by common law standards,<sup>121</sup> they are frequently at a disadvantage in racial discrimination lawsuits. When a Japanese defendant claims that

113. McGowan, Wa No. 11926, at 2; Webster, *McGowan v. Narita*, *supra* note 27, at 346.

114. McGowan, Wa No. 11926, at 8; Webster, *McGowan v. Narita*, *supra* note 27, at 351.

115. McGowan, Wa No. 11926, at 9; Webster, *McGowan v. Narita*, *supra* note 27, at 350.

116. McGowan, Wa No. 11926, at 9; Webster, *McGowan v. Narita*, *supra* note 27, at 350.

117. McGowan, Wa No. 11926, at 16; Webster, *McGowan v. Narita*, *supra* note 27, at 358.

118. The appellate decision is not available. Consequently, I have relied on newspaper reports to determine the holding. *See, e.g., Johnston, supra* note 27.

119. *Id.*

120. Eric Johnston, *Reporter Eric Johnston on McGowan Victorious Appeal*, Oct. 19, 2006, <http://www.debito.org/?p=52> (reporting the High Court’s finding that Narita exceeded social norms).

121. Professor Kevin Clermont has likened the Japanese burden of proof to the exacting “beyond a reasonable doubt” standard of common law. *See* Kevin Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT’L L.J. 263, 264 (2004).

a foreign plaintiff misunderstood a defendant's statements, he can often neutralize the testimony offered by the plaintiff.

Indeed, this is precisely the strategy deployed by the defendant in the *McGowan* case. By assailing McGowan's linguistic abilities, Narita undermined the credibility of the testimony brought forth against him. He was then able to persuade the court of first instance that his actions were not racially motivated. Although reversed on appeal, the *McGowan* decision points to the need for a better method to handle racial discrimination lawsuits.

### *B. Antithesis: Permissible Discrimination*

The previous decisions evince a strong stance by the Japanese judiciary against blatant racism. In each case, the racist conduct was overt: a verbal exchange during which the plaintiff's race was referenced explicitly, a sign or policy posted on the wall. But what about less visible forms of racial discrimination? This Section considers plaintiffs who have been excluded from private clubs, barred from cultural activities, and denied financial services without access to the private rules that exclude them. Japanese courts have been far less likely to find discriminatory acts "illegal" in these realms. Just as the United States has devised "rational basis" scrutiny to adjudicate certain acts of discrimination, so too have the Japanese courts. If a defendant can articulate "reasonable grounds" for his act of discrimination, a court is likely to find in his favor.<sup>122</sup> Three kinds of cases suffice to show where Japanese courts draw the line between acceptable and unacceptable discrimination.

#### 1. Swinging Both Ways: The Golf Club Cases

In the United States, the "freedom of expressive association" permits private bodies to discriminate based on factors such as race, gender, and sexual orientation.<sup>123</sup> The Japanese Constitution, which enshrines many of the freedoms safeguarded by its U.S. counterpart, likewise permits private associations to discriminate based on race.<sup>124</sup> When applied, this

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122. See *infra* notes 168–184 and accompanying text.

123. Public accommodations laws in the United States have diminished the number and type of places that may discriminatorily exclude members of a disfavored group. Yet, the First Amendment still guarantees the right to choose one's associates. Thus, courts must decide whether the group engages in some form of expression in order to determine whether it has the right to exclude such persons. See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (concluding that it is permissible for the Boy Scouts to prevent an openly gay man from serving as a group leader).

124. Compare U.S. CONST. amend. XIV, and *Boy Scouts of Am.*, 530 U.S. at 640, with KENPō, art. 14, and *Plaintiff v. Hachijōji Country Club*, 1043 HANREI JIHō 74 (Tokyo D. Ct., Sept. 9, 1981).

principle has allowed Japanese golf clubs to turn down applicants due to their racial or ethnic background. Resident Koreans, in particular, have been rejected numerous times for precisely that reason.<sup>125</sup> When these racist restrictions are challenged in courts of law, however, the results have varied. In the three opinions that I have been able to locate,<sup>126</sup> discrimination based on freedom of association was permitted in two instances, but held illegal in a third. This in itself points to the need for guidance.

a. *Plaintiff v. Hachiôji Country Club*<sup>127</sup>

The first case concerning golf club membership, decided in 1981, involved a naturalized Japanese citizen of Korean descent.<sup>128</sup> He had grown up in Japan, spoke Japanese, and was well acculturated into Japanese society.<sup>129</sup> He wanted to join a country club in Tokyo, but was refused because of his ethnic background.<sup>130</sup>

The club had a regulation restricting the membership of foreigners and recently naturalized Japanese citizens. According to the court, the decision of whether to admit “foreigners, or those who had naturalized but only been citizens for a certain number of years,” was properly left to the “autonomous discretion” of the membership committee.<sup>131</sup> This policy was based on the presumption that “foreigners are generally different from the Japanese in lifestyle, behavior, customs, ways of thinking, emotions, and other spiritual activities. Moreover, since it is difficult to overcome the language barrier, there are many situations where it may be difficult to form relationships of mutual trust between foreigners and Japanese.”<sup>132</sup>

The plaintiff indicated that, as a lifelong resident of Japan and recently naturalized Japanese citizen, the above policy concerns were inapposite. The court agreed, noting that “the mechanical application of the regulation may be prejudicial to this plaintiff.”<sup>133</sup> Nevertheless, both of his legal claims were dismissed.

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125. See Akira Masaoka, *Kanasai Kogin Hurt Community*, DAILY YOMIURI, Jan. 26, 2002, at 2 (“[M]any other golf courses refuse membership to ethnic Koreans.”).

126. I found mention, but no judicial opinion, for a fourth lawsuit. See *Japan-Born Korean to Sue Golf Course for Discrimination; Saitozaki Country Club*, KYODO NEWS SERV., July 1, 1989 (describing a lawsuit brought by resident Korean Kim Sang Gil against the Saitozaki Country Club for refusing his membership without specifying a reason).

127. *Hachiôji Country Club*, 1043 HANREI JIHÔ at 74.

128. See *id.* at 75.

129. See *id.*

130. See *id.*

131. *Id.* at 75–76.

132. *Id.* at 77.

133. *Id.*

First, based on Article 14(1) of the Constitution,<sup>134</sup> the plaintiff argued that the policy violated the right to equality that all Japanese citizens enjoy. As we have seen, however, this constitutional provision only applies to government bodies. Private entities such as golf courses are presumably<sup>135</sup> immune.

Second, the plaintiff claimed that the regulation violated public order and good morals, in violation of Article 90 of the Japanese Civil Code.<sup>136</sup> However, the court held that since the country club did not make its regulations *public*, it could not violate the public order. Moreover, as a private entity, the country club had the autonomy to decide *how* to implement its policies. If the plaintiff's five and one-half years as a naturalized Japanese citizen did not satisfy the "certain number of years" requirement of the regulation, that too would "not violate the public order."<sup>137</sup>

The court denied the plaintiff recovery, indirectly approving the club's discriminatory membership policies. It is important to note the court's deference to the club's regulations. The court did not pry into whether the five-year limit was rational, instead giving considerable discretion to the club's creation and implementation of membership policies.

b. *Yi Tôk-ung v. S.T.T. Development Corp.*<sup>138</sup>

In the mid-1990s, even before Japan had ratified CERD, the Tokyo District Court heard a similar case regarding discrimination by a golf club. In this case, the plaintiff, Yi Tôk-ung, was a resident Korean born and raised in Japan, but who had not taken Japanese citizenship.

Yi was the president of a paint manufacturing company. In 1988, his company took out a corporate membership in the Pete-Dye Golf Course, registered under the name of a Japanese employee.<sup>139</sup> In 1991, Yi wanted to transfer the membership to himself in his individual capacity.<sup>140</sup> The golf course refused because, unlike the employee, Yi was not a citizen of Japan. Yi claimed emotional damages and sought compensation.<sup>141</sup>

134. See *supra* note 102.

135. But see *Yi Tôk-ung v. S.T.T. Dev. Corp.*, 874 HANREI TAIMUZU 298 (Tokyo D. Ct., Mar. 23, 1995) (ruling that a golf course is a quasi-public entity for the purposes of constitutional analysis).

136. MINPÔ, art. 90 ("Any legal act that aims to violate the public order or good morals is void.").

137. *Hachiôji Country Club*, 1043 HANREI JIHÔ at 75.

138. *Yi Tôk-ung*, 874 HANREI TAIMUZU at 298.

139. See *Court Disallows Golf Club Membership Nationality Rule*, KYODO NEWS SERV., Mar. 23, 1995.

140. *Id.*

141. *Yi Tôk-ung*, 874 HANREI TAIMUZU at 298.

Like the plaintiff in *Hachiôji Country Club*, Yi formulated his legal challenge on both Article 14(1) of the Constitution and Article 90 of the Civil Code.<sup>142</sup> In this case, however, the Tokyo District Court came to the opposite conclusion. Initially, the court reasoned, golf clubs were exclusive domains dedicated to leisure and relationship-building among their members; it was therefore permissible to exhibit a degree of arbitrariness in their membership policies.<sup>143</sup> Since that time, however, golf had grown more popular among the people of Japan.<sup>144</sup> Membership rights circulated in the marketplace; campaigns to recruit new members also entered the public realm. Thus, the court determined that

[i]t cannot be denied that golf clubs are organizations with a certain social nature. Thus golf clubs, while enjoying wide latitude in their own management, cannot enjoy completely autonomous discretion; there should be some limits. It is unavoidable that, in exercising their discretion, certain deviations will be held to be illegal.<sup>145</sup>

The court further held that, under contemporary social norms, it was difficult to discern a “rational ground” (*gôriteki riyû*) for excluding a resident Korean, especially given *this* particular plaintiff’s background and familiarity with Japanese culture.<sup>146</sup>

The court ordered S.T.T. Development to pay Yi 3 million yen in compensation for emotional damages. It also required the golf club to permit the transfer of the corporate membership to Yi in his individual capacity.<sup>147</sup> He would henceforth be a “playing member” (*pureiingu membaa*) in the jargon of Japanese golf.

### *c. Hyon Yong Ok v. Chiba Country Club*

The Tokyo District Court heard a third golf club case in 2001, five years after Japan ratified CERD.<sup>148</sup> This ratification may have led some to anticipate a holding more deferential to foreign plaintiffs. This expectation would have been buttressed by the fact that the same district court had found similar behavior illegal and compensable in the *Yi Tôk-ung* decision of 1995. But, once again, the Tokyo District Court reversed course and found in favor of the discriminating golf club.<sup>149</sup>

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142. KENPÔ, art. 14, para. 1; MINPÔ, art. 90.

143. *Yi Tôk-ung*, 874 HANREI TAIMUZU at 301.

144. *Id.*

145. *Id.*

146. *Id.* at 302.

147. *Id.*

148. *Hyon v. Chiba Country Club (Hyon I)*, 1773 HANREI JIHÔ 36 (Tokyo D. Ct., May 31, 2001), *aff'd*, 1773 HANREI JIHÔ 34 (Tokyo H. Ct., Jan. 31, 2002).

149. *Id.* at 44.

Hyon purchased a golf membership from a Japanese friend in 1995,<sup>150</sup> fully aware that the golf club had restricted the number of foreign members that it would accept.<sup>151</sup> The golf club rationalized its regulation on the theories that foreign members (1) placed large bets on their golf games; (2) argued while on the green and generally behaved badly; and (3) played only with other foreigners, and avoided playing with the Japanese.<sup>152</sup> To minimize such nuisances, the club's executive council had passed a resolution to limit foreign membership.<sup>153</sup>

In the court of first instance, Hyon challenged this resolution as a violation of Article 14(1) of the Constitution and Articles 90 and 709 of the Civil Code.<sup>154</sup> More than in the previous pair of golf club decisions, the Tokyo District Court analyzed the constitutional claim. As a preliminary matter, the court noted that constitutional protections did, except in special circumstances, extend to foreigners.<sup>155</sup> Next, the court noted the possible contradictions between provisions of the Constitution, which guaranteed the right to equality on the one hand, and the freedom of association and right to economic activity (property, occupation) on the other.<sup>156</sup> The court went on to explain that the government could intervene in interpersonal relations only in the exceptionally rare situation in which the infringement of a person's rights exceeded social norms in light of a particular constitutional provision.<sup>157</sup>

In sum, the golf club's constitutionally guaranteed freedom of association trumped Hyon's right to equality. Likewise, the resolution did not violate the public order, which would have made it voidable under Article 90 of the Civil Code;<sup>158</sup> nor was it an illegal act under Article 709 of the same.<sup>159</sup>

Although bound by neither of the previous Tokyo District Court's decisions, the *Hyon I* court referenced both cases, and attempted to distinguish the *Yi Tôk-ung* decision. Specifically, it acknowledged that the golf club's restriction on foreign members "did, taken as a whole, have

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150. See *Discrimination Suit Against Golf Club Fails: Judge Tells Ethnic Korean that Restricting Foreigners is Organization's Right*, JAPAN TIMES ONLINE, June 1, 2001, <http://search.japantimes.co.jp/cgi-bin/nn20010601a8.html>.

151. *Hyon I*, 1773 HANREI JIHÔ at 41.

152. *Id.*

153. *Id.*

154. KENPÔ, art. 14, para. 1; MINPÔ, art. 709 ("A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom."); see also *supra* note 67.

155. *Hyon I*, 1773 HANREI JIHÔ at 42.

156. *Id.*

157. *Id.*

158. See *supra* note 136.

159. *Hyon I*, 1773 HANREI JIHÔ at 44.



an impact on society.”<sup>160</sup> Nonetheless, because the golf club enjoyed private autonomy, and the freedom of association, its exclusionary policy could not violate social norms. And, because there was no violation of social norms, the court explicitly refused to consider whether the regulation of foreign members was rational, or what reasons the club had for adopting its nationality-based resolution.<sup>161</sup>

On appeal to the Tokyo High Court, Hyon added a claim based on CERD.<sup>162</sup> The appellate court provided two reasons for dismissing this additional claim. First, the court noted that CERD only applies to governmental bodies, and so could not regulate relations between private actors.<sup>163</sup> Second, the court recalled that Japan had included a reservation to its ratification of CERD that had preserved the “freedom of assembly, association, and expression” enjoyed by Japanese citizens.<sup>164</sup>

In the rarefied air of golf clubs, there is some doubt as to the legality of race- or nationality-based discrimination. One court found this kind of discrimination rational,<sup>165</sup> a second court found it irrational,<sup>166</sup> and a third refused to inquire as to the rationality of such a policy.<sup>167</sup> The legal status of racially exclusive membership policies is thus an area of uncertainty in Japanese law.

## 2. Financial Services: *Herman v. Asahi Bank*<sup>168</sup>

As noted above, the foreign media has played an important role in the prosecution of racial discrimination cases in Japan.<sup>169</sup> In *Herman v. Asahi Bank*, the plaintiff, Steve Herman, was serving as chairman of the

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160. *Id.*

161. *Id.*

162. Hyon v. Chiba Country Club (*Hyon II*), 1773 HANREI JIHŌ 34, 36 (Tokyo H. Ct., Jan. 31, 2002).

163. *Id.*

164. The Tokyo High Court stated,

In applying the provisions of paragraphs (a) and (b) of article 4 [of CERD] Japan fulfills the obligations under those provisions to the extent that fulfillment of the obligations is compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under the Constitution of Japan, noting the phrase “with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention” referred to in article 4.

*Id.*

165. Plaintiff v. Hachiōji Country Club, 1043 HANREI JIHŌ 74, 75 (Tokyo D. Ct., Sept. 9, 1981).

166. Yi Tôk-ung v. S.T.T. Dev. Corp., 874 HANREI TAIMUZU, 298, 302 (Tokyo D. Ct., Mar. 23, 1995).

167. *Hyon I*, 1773 HANREI JIHŌ 34, 44 (Tokyo H. Ct., Jan. 31, 2002).

168. *Herman v. Asahi Bank*, 1789 HANREI JIHŌ 96, 97 (Tokyo D. Ct., Nov. 12, 2001).

169. See *supra* note 55 and accompanying text.

Foreign Press in Japan.<sup>170</sup> Although he had lived in Japan for ten years,<sup>171</sup> Herman had still not become a permanent resident.<sup>172</sup> The case arose when a bank rejected his mortgage application, in response to which he filed a racial discrimination lawsuit.

The forty-one-year-old U.S. citizen claimed that the Asahi Bank had “a secret manual that forbids them from accepting an application from anyone who is not a citizen or resident of Japan.”<sup>173</sup> This discrimination, Herman alleged, amounted to a violation of the Constitution, the ICCPR, and CERD.<sup>174</sup> He sought eleven million yen in damages.<sup>175</sup>

In its defense, the bank argued that its policy of refusing loans to non-permanent residents had a non-discriminatory purpose. Because such people are not certain to stay in Japan, temporary residents posed a special risk to potential creditors by, for example, leaving Japan before repaying outstanding debts. To minimize the number of outstanding loans, the bank rebutted, such a policy was rational.<sup>176</sup>

The Tokyo District Court did not scrutinize the policy’s rationality with the same tenacity it had in, for example, the *Hyon I* case.<sup>177</sup> The court entertained the possibility that, if a non-permanent resident’s visa were not renewed, he could be forcibly deported in accordance with immigration law.<sup>178</sup> Were that to happen, “even if [his property] were secured by person or thing in Japan, the expense, time and effort needed to manage and collect the debt would invariably be greater than if the debtor had remained in Japan.”<sup>179</sup> This passed the court’s “rational basis” test. Although the bank’s concern about a mortgagor’s fleeing would not apply to everyone, and certainly not to Herman, the court accepted it with significant deference. A party’s justification for discrimination need not be airtight, it would seem. But neither can it be empty.

The court also dismissed Herman’s CERD claim. First, it found that the language of CERD did not apply to the facts of his case.<sup>180</sup> Article 1(2) specifically states that CERD “shall not apply to distinctions, exclusions, restrictions or preferences . . . between citizens and non-

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170. See Yumiko Miyai, *Credit Not Given Where Credit Is Due*, DAILY YOMIURI, Mar. 15, 2002, at 7.

171. See Hadfield, *supra* note 55.

172. Herman, 1789 HANREI JIHŌ at 97.

173. *Id.* at 100.

174. *Id.* at 98–99; see KENPŌ, art. 14, para. 1; ICCPR, *supra* note 68, art. 26; CERD, *supra* note 37, art. 1(1).

175. Herman, 1789 HANREI JIHŌ at 97.

176. *Id.* at 99.

177. *Id.* at 101–02.

178. *Id.* at 101.

179. *Id.*

180. Herman, 1789 HANREI JIHŌ at 102.

citizens.”<sup>181</sup> Since the bank was, at least implicitly, distinguishing citizens from non-citizens (or non-permanent residents), the court determined that there had been no violation.<sup>182</sup>

Second, the court found that the act of discriminating against a non-permanent resident did not run afoul of the proscribed classifications listed in CERD: race, color, descent, or national or ethnic origin.<sup>183</sup> Since the bank’s policy did not implicate any of these prohibited bases, it could not have violated the express provisions of CERD. Of course, in practice, the vast majority of non-permanent residents in Japan—like Herman—could very well be of a different race. However, because the policy did not single out a proscribed classification, *de facto* discrimination would not be illegal.<sup>184</sup>

### 3. Cultural Activities: *Shukert v. Miyagi Prefecture*<sup>185</sup>

Finally, the Japanese Supreme Court has allowed amateur sports leagues to exclude foreigners from participating in national tournaments. In *Shukert v. Miyagi Prefecture*, a U.S. citizen wanted to play in Japan’s national amateur hockey tournament but was barred because of his nationality.<sup>186</sup> The plaintiff, Douglas Shukert, filed a claim based on Article 14 of the Constitution and on CERD,<sup>187</sup> which he pursued all the way to the Supreme Court.

The Supreme Court affirmed what both lower courts had found: that the national tournament was designed to train Japanese athletes for international competitions.<sup>188</sup> Thus, Article 14 of the Constitution “did not provide absolute equality; some discriminatory treatment can be recognized as rational depending on the nature of the matter.”<sup>189</sup> The court did

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181. CERD, *supra* note 37, art. 1(2).

182. *Herman*, 1789 HANREI JIHŌ at 102.

183. *Id.* Article 1(1) states that “racial discrimination” shall mean any

distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

CERD, *supra* note 37, art. 1(1).

184. *Herman*, 1789 HANREI JIHŌ at 102.

185. *Shukert v. Miyagi Prefecture*, Wa No. 1131 (Sendai D. Ct., Nov. 25, 2002) (on file with author), *aff’d*, Wa No. 2 (Sendai H. Ct., July 25, 2003) (on file with author), *aff’d*, Wa No. 1741 (S. Ct., June 11, 2004) (on file with author).

186. *See* Hall, *supra* note 36.

187. KENPŌ, art. 14, para. 1; CERD, *supra* note 37, arts. 1, 14.

188. *Shukert*, Wa No. 1741, at 1.

189. *Id.*; *Gaikokujin seigen wa goken, kokutai no sankashikaku meguri saikosai* [Restricting foreigners from playing in the national tournament does not violate the Constitution], ASAHI SHIMBUN, June 12, 2004 (on file with author).

not specify what “matters” or forms of discriminatory treatment would qualify as rational.

### C. Synthesis

The above case law reveals a split between permissible and impermissible discrimination. Generally, if the discriminating entity can articulate a reasonable basis for the discriminatory policy, a court will uphold the exclusion as legal.<sup>190</sup> Courts show varying degrees of *scrutiny* in their reasonableness analyses, in some cases glossing over it,<sup>191</sup> and in others tenaciously prodding the proffered justification, as in *Hyon II*.<sup>192</sup> As a rule, a court must adduce *some* social benefit to permit the exclusion. Pure fear of the foreign will not pass muster.

In *Herman* and *Shukert*, the defendant stated a good-faith reason for excluding foreigners.<sup>193</sup> In *Herman*, the bank cited the problem of additional collection costs from fleeing foreign creditors.<sup>194</sup> On closer inspection, however, this is not a particularly robust justification. Japanese citizens could also quit the country, leaving their mortgaged property for the bank to initiate foreclosure. However, there is a *rational* link between the discrimination and the purported—though unproven—social benefit. Banks should be able to minimize the potentially higher costs associated with collecting debts.

Likewise, in *Shukert*, the development of amateur athletes provided a *rational* basis for excluding foreigners from playing in a national tournament.<sup>195</sup> Again, this justification is not airtight, but rather a more or less defensible explanation of the sports league’s conduct.

By contrast, those accused of discrimination in the cases discussed in Part II.A lacked a good faith basis for their exclusion. The categorical rejection of foreigners from a bar, bathhouse, or jewelry store benefits no one. True, such policies may minimize awkward interchanges between Japanese and foreigners, making for a smoother social environment. But social ease, as seen in the *Arudou* decision,<sup>196</sup> does not promote a sufficient societal interest to permit discrimination.

Between these poles lie the problematic golf club lawsuits. Japan recognizes the freedom of association, and with it a private organiza-

190. See, e.g., *Herman v. Asahi Bank*, 1789 HANREI JIHō 96, 102 (Tokyo D. Ct., Nov. 12, 2001); *supra* notes 168–182 and accompanying text.

191. See, e.g., *Plaintiff v. Hachiōji Country Club*, 1043 HANREI JIHō 74 (Tokyo D. Ct., Sept. 9, 1981); *supra* notes 127–137 and accompanying text.

192. See, e.g., *Hyon v. Chiba Country Club (Hyon II)*, 1773 HANREI JIHō 34, 36 (Tokyo H. Ct., Jan. 31, 2002); *supra* notes 159–163 and accompanying text.

193. See *supra* Parts II.B.2, II.B.3.

194. See *supra* Part II.B.2.

195. See *supra* Part II.B.3.

196. See *supra* Part II.A.2.

tion's right to discriminate in selecting its members. In some ways, it is difficult to draw a principled division between a private club, which may discriminate in selecting its membership, and a bathhouse, which may not impose the same standards in choosing its clientele. Is a *private* club's freedom of association so important that the State will not interfere, but rather, in effect, sanction a discriminatory policy? Why is apprehension about mingling with foreigners valid when it comes to accepting them as members, but invalid when it comes to permitting them as patrons? And why are unproven allegations about cost collection defensible, but social anxieties bred of an inability to communicate with non-Japanese speakers so readily dismissed? These questions indicate some of the legal lacunae that Japanese legislators may want to consider.

In the meantime, one could argue that the attention generated by these lawsuits has had a didactic effect in Japan. But a stronger response, such as a law banning racial discrimination, would bring Japan more in line with the international community. Rather than rely on the legalistic *legerdemain* of judges who indirectly apply international law, Japan should take a stronger stance against racism. The point is not that Japan is a particularly racist country; every society is racist to some degree. Rather, with an incomplete commitment to racial diversity, Japan does not live up to the role on the world stage that it believes it rightfully holds.

### III. THE GOVERNMENT OF JAPAN AND THE U.N. HUMAN RIGHTS REGIME

While private citizens have challenged racially discriminatory conduct in Japanese courts, a related debate has been unfolding between the Japanese government and various U.N. bodies. Through presentations and reports, these interactions highlight the various socio-legal problems surrounding racial discrimination in Japan. The strophe of international pressure for anti-discrimination laws is repeatedly rebuffed by the Japanese antistrophe that denies the necessity of such legislation. This section highlights relevant findings from three U.N. bodies: the Human Rights Committee, which monitors ICCPR implementation; the Committee on the Elimination of Racial Discrimination (CERD Committee), which monitors CERD implementation; and the U.N. Special Rapporteur on Racism. Japan's response to the various findings and recommendations of these bodies balances out the discussion.

Before taking up this conversation, I must first touch on Japan's treatment of international law. Historically, Japan has shown great deference to international law, and generally grants international treaties the

force of domestic law.<sup>197</sup> Scholars advocate the theory that international treaties have domestic force of law in Japan.<sup>198</sup> Judges, however, are far more circumscribed in their application of international treaties. Before applying international law, judges first weigh the precision of a treaty's terms, the context in which it is invoked, and the extent to which domestic law already covers the particular area.<sup>199</sup>

But, apart from its attitude toward international law, what substantive obligations has Japan assumed through acceding to international human rights instruments? By 1980, Japan had signed only two of the major international human rights conventions;<sup>200</sup> some considered this a reflection of insincere commitment to human rights.<sup>201</sup>

To staunch such criticisms, and to boost its international reputation—and perhaps to land a permanent seat on the U.N. Security Council—Japan has significantly changed its tune.<sup>202</sup> By 1999, Japan had ratified such important human rights instruments as the Convention Against Torture,<sup>203</sup> the Convention on the Rights of the Child,<sup>204</sup> and, crucial to this discussion, the Convention on the Elimination of All Forms of Racial Discrimination.<sup>205</sup>

Somewhat less impressive has been Japan's embrace of ethnic and racial diversity. At present, despite a decade of calls from U.N. bodies, domestic non-governmental organizations, and scholars, Japan has not passed a law to ban private acts of racial discrimination. In the past ten years, Japanese courts have filled in the legislative gap by compensating foreign plaintiffs who sue for racial discrimination. In handing down

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197. See, e.g., YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* 28 (1998); Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan*, 28 *STAN. J. INT'L L.* 139, 152–53 (1992).

198. Port, *supra* note 197, at 153.

199. IWASAWA, *supra* note 197, at 47–48.

200. Japan had ratified only two international human rights treaties by 1980. It ratified additional instruments in the 1980s and 1990s. See Univ. of Minn., Ratification of Human Rights Treaties—Japan, <http://www1.umn.edu/humanrts/research/ratification-japan.html> (last visited Dec. 28, 2008).

201. NEARY, *supra* note 40, at 50.

202. *Id.* at 49 ("There was a qualitative change in the Japanese approach to human rights in the 1990s . . .").

203. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100–20 (1988), 1465 U.N.T.S. 85.

204. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

205. CERD, *supra* note 37; see also U.N. HIGH COMM'R ON HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 6 (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf> (listing the dates of Japan's ratification of major human rights instruments).

verdicts, Japanese courts have often cited to international human rights law, such as CERD and the ICCPR.<sup>206</sup>

When it comes to applying international human rights law, courts routinely hold that international treaties “are not intended to be directly applied to legal relations between private individuals, but are to be indirectly applied through provisions contained in specific substantive private law.”<sup>207</sup> As the discussion in Part II suggests, Japanese courts have repeatedly imported the normative pith of international law through Japanese tort law. However, this approach remains an unfinished project. As the following discussion makes clear, a number of unanswered problems still lingers.

### A. Human Rights Committee Reports

When Japan ratified the ICCPR in 1979, it undertook a duty to submit periodic compliance reports to the Covenant’s Human Rights Committee (HRC).<sup>208</sup> To date, Japan has submitted five such reports.<sup>209</sup> In June 1997, Japan submitted its fourth report,<sup>210</sup> which the HRC considered in October 1998; Japan submitted its fifth report in December 2006, although the HRC has yet to issue its findings on this report.<sup>211</sup> As with all States’ reports, Japan’s compliance reports tend to portray domestic events in the best possible light. Consequently, while due attention is paid to the responses articulated in Japan’s 2006 Report, the emphasis here is on the HRC’s more objective observations.<sup>212</sup>

Three of the HRC’s concerns are particularly germane to the present discussion: (1) “the lack of institutional mechanisms available for

206. See, e.g., *supra* Part II.

207. IWASAWA, *supra* note 197, at 91 (quoting 1468 HANREI JIHŌ 122, 129–30 (Osaka D. Ct., June 18, 1993)).

208. ICCPR, *supra* note 68 (ratified by Japan on Sept. 21, 1979). Article 40(1)(b) requires States to submit compliance reports “whenever the Committee so requests.” *Id.* art. 41(1)(b).

209. See, e.g., MOFA, *Fifth Periodic Report by the Government of Japan Under Article 40 Paragraph 1(b) of the International Covenant on Civil and Political Rights* (2006), available at [http://www.mofa.go.jp/policy/human/civil\\_rep6.pdf](http://www.mofa.go.jp/policy/human/civil_rep6.pdf) [hereinafter *Fifth Periodic Report*]; MOFA, *Fourth Periodic Report by the Government of Japan Under Article 40 Paragraph 1(b) of the International Covenant on Civil and Political Rights* (1997), available at [http://www.mofa.go.jp/policy/human/civil\\_rep4/index.html](http://www.mofa.go.jp/policy/human/civil_rep4/index.html) [hereinafter *Fourth Periodic Report*].

210. See *Fourth Periodic Report*, *supra* note 209.

211. See U.N. High Comm’r on Human Rights, Human Rights Comm., *Fifth Periodic Reports of States Parties Due in 2002: Japan*, U.N. Doc. CCPR/C/JPN/5 (Apr. 25, 2007). It should be noted that Japan submitted this report well after the 2002 deadline.

212. See U.N. High Comm’r on Human Rights, Human Rights Comm., *Concluding Observations of the Human Rights Committee, Japan*, U.N. Doc. CCPR/C/79/Add.102 (Nov. 19, 1998), available at <http://www1.umn.edu/humanrts/hrcommittee/japan1998.html> [hereinafter *1998 HRC Report*].

investigating violations of human rights and for providing redress to the complainants";<sup>213</sup> (2) the elasticity of the concept of "reasonable discrimination";<sup>214</sup> and (3) the Japanese judiciary's lack of expertise in human rights law.<sup>215</sup>

First, the HRC commended Japan's establishment of a Civil Liberties Commission.<sup>216</sup> However, HRC went on to note that the Commission had been set up under the Japanese Ministry of Justice and limited to issuing recommendations.<sup>217</sup> This led the HRC to recommend that Japan establish an "independent mechanism" to investigate human rights violations.<sup>218</sup> Similarly, the Ministry of Justice has also set up numerous Human Rights Counseling Offices for Foreigners throughout Japan.<sup>219</sup> But, like the Civil Liberties Commission, these entities are understaffed, ineffectual, and limited in authority. They can request, but not compel, a discriminator to halt his conduct.<sup>220</sup> Without more forceful procedures in its arsenal—the competence to impose fines or demand apologies—neither the commission nor the establishment of counseling offices is likely to alter the racial attitudes of discriminating Japanese.

In its 2006 report, the Government of Japan responded to some of these concerns. First, Japan stated that the counseling offices have "respond[ed] to various human rights inquiries from foreign nationals,"<sup>221</sup> such as "being refused rental of an apartment or being refused entry to a restaurant or public bath."<sup>222</sup> This may seem encouraging, as it shows that the Japanese government is responding to the incidents discussed above.

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213. *Id.* para. 9.

214. *Id.* para. 11.

215. *Id.* para. 32.

216. *Id.* para. 3.

217. *Id.* para. 9.

218. *Id.*

219. See MOJ, Human Rights Counseling Offices for Foreigners (2006), <http://www.moj.go.jp/ENGLISH/information/hrcf-01.html> (last visited Dec. 28, 2008) (listing representative offices).

220. See, e.g., 1998 HRC Report, *supra* note 212; U.N. High Comm'r on Human Rights, Comm. on Elimination of Racial Discrimination, *Concluding Observations of the Comm. for the Elimination of Racial Discrimination: Japan*, U.N. Doc. CERD/C/304/Add.114 (Apr. 27, 2001); U.N. High Comm'r on Human Rights, Comm. on Elimination of Racial Discrimination, *Report of the Comm. on the Elimination of Racial Discrimination*, paras. 159–85, U.N. Doc. A/56/18 (Jan. 10, 2001); U.N. High Comm'r on Human Rights, Comm. on Elimination of Racial Discrimination, *Second Periodic Reports of States Parties Due in 1999, Addendum: Japan*, U.N. Doc. CERD/C/350/Add.2 (Sept. 26, 2000); MOFA, *Comments of the Japanese Government on the Concluding Observations Adopted by the Comm. on the Elimination of Racial Discrimination on March 20, 2000 [sic], Regarding the Initial and Second Periodic Report of the Japanese Government* (Oct. 2001), available at <http://www.mofa.go.jp/policy/human/comment0110.html>.

221. See *Fifth Periodic Report*, *supra* note 209, para. 50.

222. *Id.* para. 48.



But the government's relatively lackluster response dims any hope that these problems will be taken seriously. The Report simply notes that the Ministry of Justice is "aiming to remedy and prevent harm caused by human rights infringements through human rights counseling and investigation and resolution of human rights infringement cases."<sup>223</sup> This amounts to a fairly weak stance. First, *aiming* to remedy a problem is not the same as fixing it. Second, counseling and investigation are not strong enough mechanisms to prevent racial discrimination. Punishment or injunction, or preferably both, would signal that Japan is more serious about its international human rights commitments.

Second, the HRC expressed concern about the vagueness of "reasonable discrimination."<sup>224</sup> Indeed, this is the very problem faced by several of the plaintiffs above.<sup>225</sup> Without providing guidance as to what discrimination is *reasonable*, Japan in effect sanctions various forms of discrimination. No one would doubt that *some* amount of discrimination is unavoidable. As discussed above in the *Shukert* and *Herman* cases, Japanese sports leagues and businesses may legally discriminate against foreigners in limited contexts. Provided defendants articulate a reason in good faith, courts have deferred to the exclusionary preferences of Japanese corporations and organizations.<sup>226</sup>

However, is it *reasonable* to deny foreigners membership in a golf club? What social benefit is promoted by such exclusions? And could the standard of reasonability not be more clearly delineated? Many Japanese—including the defendants in *Bortz* and *McGowan*—thought that they had the right to discriminate against foreigners, a misconception buttressed by police activity and politicians' rants. Interestingly, the Japanese government's 2006 Report does not address the concept of reasonable discrimination. Nevertheless, direction on this topic would help to delineate "permissible" discrimination, while signaling that discrimination itself is, in most situations, illegal.

Third, the HRC noted that Japanese judges, prosecutors, and administrative officers are not sufficiently trained in human rights law. To compensate for this inadequacy, "[j]udicial colloquiums and seminars should be held to familiarize judges with the provisions of the Covenant."<sup>227</sup> This recommendation is well founded based on the case law discussed above. At one extreme, the *Bortz* opinion demonstrates one judge's complete fluency with the discourse of international human rights; the judge traced the history of human rights from Confucius to

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223. *Fifth Periodic Report*, *supra* note 209, para. 49.

224. *1998 HRC Report*, *supra* note 212, para. 11.

225. *See supra* notes 93–107 and accompanying text.

226. *See supra* Part II.B.

227. *1998 HRC Report*, *supra* note 212, para. 32.

Nietzsche.<sup>228</sup> But, at the other extreme, the *McGowan* opinion either ignores, or turns an indifferent ear to, the past few decades of human rights developments. In any event, additional training certainly would not hurt.

The Japanese government specifically addressed this concern in its 2006 Report. Judges, both experienced and newly appointed, were expected to attend “lectures on such themes as international human rights covenants, international human rights and foreign nationals’ human rights.”<sup>229</sup> Moreover, Japan’s 2006 report also noted that judges receive training in international human rights law while at the Legal Training and Research Institute.<sup>230</sup> In light of the many fields of law about which Japanese judges are expected to be knowledgeable, ongoing education seems an adequate response.

### B. CERD Committee Report

In June 1999, Japan submitted a combined first and second report (1999 CERD Report) to the CERD Committee.<sup>231</sup> The Committee issued two responses: a summary record of its March 2001 meeting with Japanese delegates (*Summary Record*),<sup>232</sup> and a more formal set of *Concluding Observations*.<sup>233</sup> In October 2001, in order to clarify certain questions posed in the Committee’s findings, the Government of Japan published its own reply (*GOJ Reply*).<sup>234</sup> Japan has yet to submit a second report, although the Committee had requested that Japan submit its next report by January 14, 2003.<sup>235</sup> Two related themes emerge from the Committee’s reports: the status of CERD in Japan’s domestic legal order, and whether Japan will pass an anti-discrimination law.

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228. See *Bortz v. Suzuki*, 1045 HANREI TAIMUZU 216 (Shizuoka D. Ct., Oct. 12, 1999); Webster, *Bortz v. Suzuki*, *supra* note 41.

229. *Fifth Periodic Report*, *supra* note 209, para. 29.

230. *Id.* para. 30.

231. MOFA, *International Convention on the Elimination of All Forms of Racial Discrimination (First and Second Report)*, U.N. Doc. CERD/C/350/Add.2 (June 1999), available at [http://www.mofa.go.jp/policy/human/race\\_rep1/index.html](http://www.mofa.go.jp/policy/human/race_rep1/index.html) [hereinafter 1999 CERD Report].

232. Comm. on Elimination of Racial Discrimination, *Summary Record of the 1444th Meeting: Japan*, U.N. Doc. CERD/C/SR.1444 (June 11, 2001) [hereinafter *Summary Record*].

233. Comm. on Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan*, U.N. Doc. CERD/C/304/Add.114 (Apr. 27, 2001) [hereinafter *Concluding Observations*].

234. MOFA, *Comments of the Japanese Government on the Concluding Observations Adopted by the Committee on the Elimination of Racial Discrimination on March 20, 2000 Regarding Initial and Second Report of the Japanese Government*, ¶ 4(1) (2001), available at <http://www.mofa.go.jp/policy/human/comment0110.html> [hereinafter *GOJ Reply*].

235. *Concluding Observations*, *supra* note 233, para. 27.

### 1. CERD in the Domestic Legal Order

In the *1999 CERD Report*, the Japanese government succinctly summarized the status of CERD within the domestic legal order:

Provisions of treaties concluded by Japan have legal effect as a part of domestic laws in accordance with . . . the Constitution . . . . Whether or not to apply provisions of the conventions directly is judged in each specific case, taking into consideration the purpose, meaning and wording of the provisions concerned.<sup>236</sup>

Japan's adherence to CERD is essentially *ad hoc*, dependent on the vagaries of the case and (we expect) the judge. This approach to international law is, to some extent, expected, for contextualization—examining existing provisions, case law, local conditions, and so on—is always part of applying law, domestic or international. But, by postponing the decision of whether to apply CERD to the actual contours of the case, courts fail to give the treaty due consideration and may overlook international legal commitments.

In its *Summary Record*, the CERD Committee requested further clarification of CERD's domestic legal effect. The Japanese delegate explained that "international treaties did not establish the rights of individuals directly but laid down obligations which were binding on the States that had ratified them."<sup>237</sup> This, of course, is the classic view of international law: a set of obligations that binds States, but does not empower individuals to sue in the absence of additional implementing legislation.<sup>238</sup> But, without implementing legislation, individuals have no legal recourse to counter acts of racial discrimination.

This lacuna was not lost on the CERD Committee members, one of whom noted that "the Convention's provisions were not self-executing in Japanese law. Since national legislation had to be adopted to implement the Convention, it was all the more necessary to enact appropriate legislation to criminalize all acts of racial discrimination."<sup>239</sup> This may have overstated the problem, as criminalizing racist acts is hardly the only way to legislate against them. Nevertheless, the suggestion was unmistakable: Japan should domesticate this critical principle of international law by enacting some kind of implementing legislation.

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236. *1999 CERD Report*, *supra* note 231, para. 5 (emphasis added).

237. *Summary Record*, *supra* note 232, para. 5.

238. The delegate explained that "the Convention required States parties to adopt legislative, judicial, administrative or other measures which gave effect to the provisions of the Convention, but did not consider that the Convention could be directly invoked." *Id.*

239. *Id.* para. 35.

A related concern of the Committee involved the paucity of court decisions that reference CERD. While the analysis in Part II challenges this assessment—numerous courts have applied CERD since the Committee issued its report—the government's response is still quite telling. The Japanese government apparently feared that a court would apply international law before making the necessary factual determinations.<sup>240</sup> In other words, attending to international law might somehow predispose courts to impute racial discrimination to an actor who did not act with racially discriminatory intent.

Of course, as we have seen, such concerns did not deter the Osaka District Court from handing down the *McGowan* decision.<sup>241</sup> Instead, the judge brushed aside McGowan's evidence of racist conduct by dismissing McGowan's linguistic skills. Yet, the other cases discussed above in Part II.A suggest that a majority of Japanese courts can both apply international legal standards and attend to making correct factual determinations at the same time.

## 2. Prospects for a New Law

What are the prospects that Japan will pass a law banning racial discrimination in the private sphere? At this point, they appear slim, as Japan denies that such laws are necessary: "We do not recognize that the present situation of Japan is one in which discriminative acts cannot be effectively restrained by the existing legal system and in which explicit racial discriminative acts, which cannot be treated by measures other than legislation, are conducted."<sup>242</sup>

As a matter of policy, the Government of Japan has a point: the Japanese judiciary has proven to be a bulwark against racial discrimination. However, not every judge is inclined to thread international treaty law through the eye of domestic tort. Nor will every victim of racial discrimination file a lawsuit. Japanese courts' mantra that CERD may serve as an "interpretative standard"<sup>243</sup> in the indirect application of international law is a helpful beginning. But Japan cannot overlook another of CERD's important provisions: to pass appropriate legislation.<sup>244</sup>

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240. In the somewhat garbled language of the *GOJ Reply*, "There is a constraint that applying law by the court premises a fact authorized by the court based on facts claimed or evidence submitted by the parties concerned." *GOJ Reply*, *supra* note 234, ¶ 4(1).

241. *McGowan v. Narita*, Wa No. 11926 (Osaka D. Ct., Jan. 30, 2006); Webster, *McGowan v. Narita*, *supra* note 27.

242. *GOJ Reply*, *supra* note 234, ¶ 5(1).

243. See, e.g., Webster, *Bortz v. Suzuki*, *supra* note 41, at 652; Webster, *Arudou v. Earth Cure*, *supra* note 60, at 317.

244. CERD, *supra* note 37, art. 2(1)(d).

The Japanese government is on thinner ice when it states that a law banning private acts of racial discrimination is unnecessary “[s]ince the purport of the Convention has already been reflected in the provision of domestic law.”<sup>245</sup> It is not clear which “provision” the government has in mind, as no Japanese law bans *private* acts of racial discrimination. Article 14 of the Japanese Constitution does provide a normative standard,<sup>246</sup> but its limitation to *public* bodies renders it ineffective in the private sphere.

### C. Report of the U.N. Special Rapporteur

In 1993, the U.N. Commission on Human Rights established the position of Special Rapporteur on Racism to examine contemporary forms of racism and devise measures to overcome them.<sup>247</sup> The current Rapporteur, Doudou Diène of Senegal, conducted a mission to Japan in July 2005. His 2006 report caused waves when he concluded that racism in Japan was “deep and profound.”<sup>248</sup> Although the report focuses on a wider swath of conduct than contemplated by this Essay, the report’s constant refrain—that Japan must pass a law to ban racial discrimination and provide compensation—fits comfortably into the present discussion.

The report references several of the lawsuits discussed above, including *Bortz*, *Arudou*, and *Hyon I*.<sup>249</sup> The report also took several Japanese actors to task. First, the *absence* of a national law had created an environment in which “racial discrimination is practised undisturbed.”<sup>250</sup> Second, since public authorities never prosecuted discriminators, a culture of impunity had formed in various sectors of Japanese society.<sup>251</sup> Third, the report singled out the Otaru Assembly—although *any* local government would have sufficed<sup>252</sup>—for failing to pass a local ordinance in the

245. *GOJ Reply*, *supra* note 234, ¶ 5(1).

246. *See supra* note 67.

247. Comm’n on Hum. Rts. [CHR], Res. 1993/20, ¶ 10, U.N. Doc. E/CN.4/RES/1993/20 (Mar. 2, 1993).

248. *See UN Envoy Urges Japan to Adopt Anti-Discrimination Legislation*, VOICE OF AM. NEWS, May 18, 2006, available at <http://www.voanews.com/english/2006-05-18-voa6.cfm>.

249. *See* U.N. Econ. & Soc. Council [ECOSOC], *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Mission to Japan*, ¶¶ 63, 65, U.N. Doc. E/CN.4/2006/16Add.2 (Jan. 24, 2006) (*prepared by* Doudou Diène) [hereinafter *Diène Report*].

250. *Id.* ¶ 64.

251. *Id.*

252. *See Tottori Prefectural Assembly Approves Rights Ordinance*, DAILY YOMIURI, Oct. 12, 2005, at 2 (noting that the “Tottori Prefectural Assembly . . . approved the nation’s first ordinance protecting human rights”). *But see Tottori Approves Bill Nixing Disputed Human Rights Ordinance*, JAPAN ECON. NEWSWIRE PLUS, Mar. 24, 2006 (noting the same ordinance was ultimately rescinded).

*Arudou* decision. The Rapporteur specifically recommended that the Assembly pass *criminal* ordinances, so as to “allow the authorities under the local jurisdiction to prosecute such offences.”<sup>253</sup>

The Rapporteur also reacted to the *Hyon I* decision, in which the Tokyo District Court held that a golf club could discriminate against a resident Korean because it was a private entity.<sup>254</sup> This led to another broadside against the Japanese judiciary: “[I]t appears that the Japanese system is not one in which discriminatory acts can effectively be restrained by the existing legal system.”<sup>255</sup> As I have argued, the *Hyon I* decision was decided incorrectly. However, the analysis in Part II.A shows that the Japanese judiciary *often* takes a strong stance against racial discrimination. Despite occasional—and significant—lapses, the legal system has been the strongest transmitter of anti-discrimination norms in Japan. The problem is that the judiciary cannot pass laws, a responsibility that falls to the legislature.

At the end of his report, Diène provided a number of recommendations. Significant for our purposes were the several paragraphs advocating “the adoption of a national law against racism, discrimination and xenophobia.”<sup>256</sup> More concretely, the report recommended that the law penalize racial discrimination in all of its forms, particularly in the fields of “employment, housing and marriage,” while guaranteeing “access to effective protection and remedies, including compensation, to victims.”<sup>257</sup>

The United Nations, in its various manifestations, thus offers a unique lens on the way in which the Japanese government views itself. In meetings, conferences, and reports, the United Nations has consistently expressed concern about the Japanese treatment of ethnic others. It has also repeatedly urged Japan to pass a law outlawing racial slurs.<sup>258</sup> This proposed—and failed—legislation remains the final topic for discussion.

#### IV. THE WAY FORWARD

Japan’s judiciary has admirably imported the norms of international human rights law into Japanese jurisprudence. But courts can only do so much, namely, resolve disputes between private individuals or entities.

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253. *Id.*

254. *Diène Report*, *supra* note 249, ¶ 65.

255. *Id.*

256. *Id.* ¶ 76.

257. *Id.*

258. *See infra* notes 261–262 and accompanying text.

At the present moment, the problem in Japan lies in insufficient *internalization* of anti-discriminatory norms. Without changing its domestic laws, as Japan did on ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>259</sup> international human rights law will only obliquely touch Japanese society. Moreover, when it does, the effect will be isolated, localized, and transient.

The current system in Japan does not undertake one very basic tool of combating racism: *proscription*. By not passing a law to ban private acts of racial discrimination, the Japanese Diet has effectively inoculated Japanese citizens from reconciling their attitudes, understanding, and behaviors to global norms. The fact that Japanese legislators—local and national—have deliberated laws to ban racial discrimination is encouraging at first blush. However, after repeated discussions and no laws, one must question why they hesitated.

### A. National Legislation

To its credit, the Diet has debated a Human Rights Protection Bill. Since 2002, the Diet has discussed a bill that would address a wide array of human rights abuses, including discrimination.<sup>260</sup> Germane to the present discussion is Article 3 of this draft bill, and its proscription of racial discrimination by (1) local or national officials; (2) real estate agents, and providers of goods and services; and (3) employers.<sup>261</sup> Article 3 also outlaws insults, harassment, or “other words and deeds” of unjust discrimination based on race.<sup>262</sup> Although one could certainly criticize the elasticity and expansiveness of the law, it is beyond cavil that the bill represents a significant step in the right direction.

The proposed bill would entrust the investigation of violations to a Human Rights Commission.<sup>263</sup> The same Commission would also counsel

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259. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. To accord with CEDAW, Japan revised its domestic legislation in the areas of nationality, employment, and education. See generally Yuji Iwasawa, *The Impact of International Human Rights Law on Japanese Law: The Third Reformation for Japanese Women*, 34 JAPANESE ANN. INT'L L. 21, 39 (1991).

260. Jinken yōgo hōan [Human Rights Protection Bill], Diet Sess. 154, Bill No. 56 of 2002, available at <http://www.jca.apc.org/jhrf21/eng/hrpb.html> [hereinafter Human Rights Protection Bill]; see also *Legislation to Stop Human Rights Abuses Is an Urgent Need*, ASAHI SHIMBUN, July 29, 2005 (on file with author) (noting that the ruling party abandoned its plan to submit a human rights protection bill in 2005); *LDP Forgoes Immediate Diet Submission of Human Rights Bill*, KYODO NEWS INT'L, May 16, 2005 (on file with author) (noting that the government had submitted a similar bill to the Diet in 2002, but that the bill failed due to concerns about “freedom of expression and a clause barring the media from excessive coverage of individuals”).

261. Human Rights Protection Bill, *supra* note 260, art. 3.

262. *Id.*

263. *Id.* art. 28.

victims; provide guidance to perpetrators; and initiate mediation, arbitration, or litigation in the most serious instances.<sup>264</sup> It would not be able to enjoin acts of discrimination, although it could initiate a lawsuit to obtain a court injunction.<sup>265</sup>

Critics have noted three problems with the proposed bill. First, the Commission would be housed in the Ministry of Justice, essentially obviating independent investigations of human rights abuses in prisons or detention centers, which are both run by that ministry.<sup>266</sup> Second, the media expressed concern regarding limits on their powers to disseminate information about victims, family members, and others connected to the incident.<sup>267</sup> But the third criticism is perhaps the most surprising.

The proposed bill also would allow for qualified people (including, presumably, foreign nationals) with high moral integrity, and the appropriate experience in law or society to serve on an individual commission.<sup>268</sup> Commissioners investigate violations, raise awareness of human rights, and make advisory (nonbinding) recommendations to local commissions.<sup>269</sup> Since many human rights abuses are directed at foreigners, it makes sense for foreign nationals to serve as commissioners. And, since local governments appoint the commissioners after consulting the local bar and other human rights organizations,<sup>270</sup> there is little chance of nominating a "rogue" commissioner.

Nevertheless, the Liberal Democratic Party—Japan's largest and strongest political party—refused to endorse the bill out of fear that foreign residents could serve as commissioners. The Liberal Democratic Party feared that such foreign commissioners might "give preferential treatment" to citizens of certain countries, perhaps the most concerning of which was North Korea.<sup>271</sup> Most of the maximum 20,000 commission positions would, of course, be filled by Japanese citizens. However, the possibility of a foreigner monitoring human rights abuses proved too controversial for the ruling party. Having twice failed to make it through the Diet, the Human Rights Protection Bill stands a remote chance of

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264. *Id.* arts. 41, 45, 60.

265. *Id.* art. 65.

266. *See Legislation to Stop Human Rights Abuses Is an Urgent Need*, *supra* note 260.

267. *Id.*; *See Human Rights Protection Bill*, *supra* note 260, art. 42(d) (placing minor restrictions on the press: journalists could not stalk, lie in wait, block, or repeatedly phone a person connected to the investigation, nor could they "unreasonably report[]" on the facts of someone's private life).

268. *Human Rights Protection Bill*, *supra* note 260, art. 9(1).

269. *Id.* art. 6.

270. *Id.* art. 22(3).

271. *See LDP Forgoes Immediate Diet Submission of Human Rights Bill*, *supra* note 260.



becoming law. It does, however, represent committed if cautious progress toward realizing international human rights norms in Japan.

### B. Local Legislation

To fill the void present at the national level, local governments have conducted their own legislative experiments. In October 2005, for instance, the Tottori Prefectural Assembly passed an ordinance that banned racial discrimination, among other social ills, such as sexual harassment, physical abuse, and slander.<sup>272</sup> Surprisingly, and rarely for a local ordinance, the Assembly indefinitely suspended the ordinance in March 2006, citing problems with the vagueness of the term “human rights violation” and concerns about media restrictions.<sup>273</sup>

The proposed ordinance had some teeth, albeit not especially sharp ones. A Human Rights Committee could have investigated allegations, and could have advised the violator to stop the discriminatory conduct.<sup>274</sup> If the violator refused, he could have faced fines of up to 50,000 yen (\$500), and public disclosure of his name.<sup>275</sup> The ordinance was considerably softer on administrative organizations, which could “refuse to cooperate” with the commissioner if the head of the organization so decided.<sup>276</sup>

Although it was a step in the right direction, the Tottori ordinance failed to win the support of many. Not least among its detractors was the legal community. Legal scholars found it either unjustifiable in light of Tottori’s particular circumstances, or contrary to certain fundamental freedoms: those of expression, thought, and the press.<sup>277</sup> The Tottori Bar Association, pointing to the authorities’ discretion in deciding whether to disclose the names of violators, objected to the ordinance’s “arbitrary nature.”<sup>278</sup> Consequently, the Bar stated that it would not cooperate with the ordinance.<sup>279</sup>

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272. *Tottori Approves Bill Nixing Disputed Human Rights Ordinance*, *supra* note 252.

273. *Id.*

274. *Japan’s Tottori First Prefecture to Pass Human Rights Bill*, BBC INT’L REPORTS (ASIA), Oct. 12, 2005.

275. *Id.*

276. *Tottori Approves Bill Nixing Disputed Human Rights Ordinance*, *supra* note 252.

277. *Id.*

278. *Tottori Government to Halt Implementation of Human Rights Ordinance*, JAPAN ECON. NEWSWIRE PLUS, Feb. 24, 2006.

279. *Tattori Approves Bill Nixing Disputed Human Rights Ordinance*, *supra* note 252.

## CONCLUSION

It is unlikely that Japan will pass a law that bans racial discrimination in the near future. Two attempts in the national legislature, and an aborted attempt in a local government, reveal that Japanese lawmakers are not serious about solving the problem of racial discrimination. Perhaps they do not need to: foreigners continue to arrive in Japan in increasing numbers. Furthermore, why would Japan want to protect people who are, by and large, neither nationals nor long-term prospects for citizenship?

At the same time, the enhanced role of the Japanese judiciary is worthy of attention and praise. Judges have grappled with the legislative failure in creative ways, interpreting domestic law through the lens of Japan's recently assumed international legal obligations. While this represents progress toward "eliminating" racial discrimination, it also raises questions about proper notice—*e.g.*, how would a Japanese person know racial discrimination is illegal—and ultimately the domestication of international legal norms. Courts are important, even necessary, conduits for this process. But they cannot do it alone.